Supreme Court, U.S.
FILED
DEC 2 1975
MICHAEL RODAK, JR., CLERK

No. 75-129

# In the Supreme Court of the United States

OCTOBER TERM, 1975

GARY SUCHY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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Petitioner, in his amended and supplemental petition for a writ of certiorari, reiterates the basic contentions of his original petition but makes the additional contention that he was deceived into hiring a non-lawyer to represent him in his appeal from his conviction, and that he was thereby denied the assistance of counsel. In this supplemental memorandum we respond to the new contention.

1. At petitioner's trial in May 1974, in which he was convicted of possession and distribution of heroin and conspiracy, he was represented by two lawyers, David Harris and Raymond J. DeRyck, members of the Michigan bar. Petitioner does not complain of their qualifications or the quality of their representation. In the revised petition for a writ of certiorari, however, petitioner states that he hired Sterling Brown, a non-lawyer, to represent him in the court of appeals on the appeal from his conviction, on the mistaken assumption that Brown was a lawyer; he further states that Brown wrote his brief on appeal and arranged for James Thomas, a lawyer with whom Brown shared offices, to present oral argument on petitioner's appeal.[1]

Brown, as petitioner points out, was convicted in the United States District Court for the Southern District of Ohio of falsely representing himself to be a lawyer before the United States Court of Appeals for the Sixth Circuit and before the United States District Court for the Southern District of Ohio. Moreover, on May 30, 1975, Thomas, who argued the case on behalf of petitioner in the court below, was ordered to show cause why he should not

[1] The brief filed in behalf of petitioner in the court below names James D. O'Connell, the attorney whose name appears on the original petition for a writ of certiorari filed in the instant case on August 8, 1975, as the attorney for petitioner. There is also an entry of appearance on behalf of petitioner in the name of O'Connell in July 1973, in the district court, on the day that petitioner noted an appeal from his conviction.



be subjected to disciplinary action for sponsoring the admission of Brown to the court of appeals on February 19, 1975, when Brown presented oral argument in that court for two appellants in another case.

2. A federal criminal defendant is, of course, entitled to have a lawyer represent him on appeal, and, in that role, select and present the issues warranting review in a brief and present the case in oral argument if such argument is granted. See, *e.g.*, *Johnson* v. *United States*, 352 U.S. 565; *Elchuk* v. *United States*, 370 U.S. 722. This requirement of assistance of counsel is not satisfied when a defendant chooses to be represented by a person he reasonably believes to be a qualified lawyer but who, in fact, is a layman. *Harrison* v. *United States*, 387 F.2d 203, 212-213 (C.A.D.C.), reversed on other grounds, 392 U.S. 219. If petitioner was in fact deceived into hiring Brown on appeal by a false representation that Brown was a genuine lawyer, and the latter "selected the issues for review and wrote the brief himself" without the supervision and guidance of a qualified lawyer, petitioner was denied the assistance of counsel on appeal. On the other hand, if petitioner hired Brown knowing that the latter was not a lawyer, he presumably would not be entitled to relief.[2]

Although, as is apparent, there are unresolved factual questions as to whether petitioner was denied proper representation upon appeal, there is substan-

[2] He also would not be entitled to relief if he hired a lawyer, Thomas, who simply used lay people to assist him in preparing a brief under his supervision.

tial evidence that he may have been. We thus do not urge that the case be remanded to the district court for an evidentiary hearing on that question. Rather, we suggest that it would be more expeditious to remand the case to the court of appeals for further proceedings in which petitioner's present attorney can be afforded an opportunity to file a petition for rehearing setting forth the issues that he believes require further briefing and argument. Since the court of appeals has already reviewed the record in this case and has heard oral argument by a lawyer (Thomas) on petitioner's behalf, it is that court which is best able to determine whether additional briefing (beyond that which may be presented in the petition for re-hearing) and oral argument are necessary for a fair resolution of the appeal.

For the foregoing reasons we respectfully submit that certiorari should be granted and the case remanded to the court of appeals for further proceedings in which petitioner will be allowed to file a petition for rehearing and in which that court may determine whether further briefing and argument are necessary.

ROBERT H. BORK,
*Solicitor General.*

DECEMBER 1975.

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